No. 15063

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Montana

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NAMES AND ADDRESSES OF ATTORNEYS

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INDEX

TABLE OF CONTENTS

STATUTES AND TABLE OF CASES

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STATEMENT OF ISSUES

This is an action arising under the Federal Tort Claims Act, wherein the Court sat as a trier of the facts, in which the United States of American is defendant-appellee. After hearing the evidence in the case, proposed Findings of Fact and Conclusions of Law were submitted by each party, and the Court thereafter made and filed its Findings of Fact and Conclusions of Law, in which it was found that certain injuries to the plaintiff's shoulder were the proximate result of the accident alleged, and that a blood clot arising months after the alleged accident was not sufficiently established by the evidence, and particularly medical testimony, for the Court to find it to be caused by an injury sustained in the accident

alleged. Conclusions of Law in accordance therewith were made and plaintiff thereafter filed a motion to amend the Findings of Fact and Conclusions of Law which was briefed, orally argued, and overruled. Judgment was thereupon entered. The plaintiff has appealed from this judgment, specifying as error, certain Findings of the Court and failure of this Court to make Findings relating the causation of the blood clot to the accident alleged.

Rule 52 (a), Federal Rules of Civil Procedure, provides in relevant parts:

> "In all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Requests for Findings are not necessary for purposes of review. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. . . ."

The issue, therefore, is were the Court's Findings of Fact clearly erroneous with due regard being given to its opportunity to judge of the credibility of witnesses?

CONSTRUCTION OF RULE 52 (a)

Rule 52 (a) has been construed by this Circuit in numerous cases and is well defined in *Gamewell Company* v. *City of Phoenix,* 9th Circuit, 216 F. 2d, 928, wherein it is stated:

> "The Findings stand before us with the presumption of validity unless they are clearly erroneous. (Rule 52 (a), Federal Rules of Civil Procedure.) The object of the clause as to the effect of findings

is to give to findings the effect which they formerly had in equity. *United States* v. *Gypsum Co.,* 1948, 333 U. S. 364, 395. The aim is to

> '. . . make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only "clearly erroneous" findings.' *Graver Tank & Mfg. Co., Inc.* v *Linde Air Products Co.,* 1949, 336 U. S. 271, 275.

This advantage has been well stated by the Court of Appeals for the Second Circuit:

> 'For the demeanor of an orally-testifying witness is "always assumed to be in evidence". . . . The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which "cold print does not preserve" and which constitute "lost evidence" so far as an upper court is concerned.' *Broadcast Music, Inc.,* v. *Havana Madrid Restaurant Corp.,* 2 Cir., 1949, 175 F. 2d, 77, 80.

Conversely, the Supreme Court has held that a finding is clearly erroneous when

> '. . . although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' *United States* v. *Gypsum Co., supra,* p. 395.

To the same effect is *United States* v *Oregon Medical Society,* 1952, 343, U. S. 326, 339."

and also *Lew Wah Fook* v. *Brownell,* 9th Cir., 218 F. 2d, 924:

> "So far as we have seen, this is the plainest of cases in which we are asked to retry the facts. Appellant asks up to apply the doctrine of the case of *United*

> *States* v. *United Gypsum Co.*, 333 U. S. 364-395, wherein it is held, 'Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings of administrative agencies or by a jury, this court (Supreme Court and this court, too, of course) may reverse findings of fact by a trial court where "clearly erroneous" . . . . A finding if clearly erroneous where although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' This simple statement does not convert the appellate tribunals into fact finding de novo trial courts. The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum are all ingredients of the compound which we may adjudge as valid or 'clearly erroneous'. By this test in the instant case, the judgment is not clearly erroneous. However, even if we should approach the problem as the original triers of fact upon the bare record, our conclusion would be the same. We briefly digest sufficient of the evidence to support our conclusions."

and with reference to conflicting evidence the Court states, in *Carr* v. *Yokohama Specie Bank, Limited*, 9th Cir., 200 F. 2d, 251:

> ". . . where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that Court to choose between two permissible and conflicting views as to the weight of the evidence. *Bjornson* v. *Alaska S. S. Co.*, 9 Cir., 193 F. 2d 433. We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the finds of fact are not cearly erroneous."

ARGUMENT

A reading of the transcript reveals that the plaintiff, Joseph P. Hennessey, was born January 17, 1917. He had mumps and measles during his childhood (Tr. 30). In 1933, he had pneumonia and was in St. James Hospital, Butte, Montana, for two months, following which he developed acute nephritis (Tr. 30). The records of the St. James Hospital (Tr. 68) show that from July 28 to August 5, 1933, the plaintiff suffered from diarrhea, vomiting and abdominal aches. On April 20, 1934, plaintiff suffered from pneumonia and gastritis and was released on June 19, 1934 (Tr. 68). On June 25, 1934, he was afflicted with acute nephritis, which continued to October 20, 1934, which caused abdominal swelling and permanent scarring of the exterior of the abdomen (Tr. 68, 69). In 1941 he had a recurrence of the nephritis (Tr. 73, 74). In 1947 he overturned an automobile between Toston and Three Forks, Montana, resulting in a sore right shoulder, the soreness continuing for about six months (Tr. 34). In 1948, plaintiff was involved in an accident while a passenger on a Northwest Airlines Plane which overshot the runway in Butte, Montana, from which resulted sore abdominal muscles (Tr. 35, 36).

On June 2, 1949, the accident which was the subject of this action occurred, when the United States employee fell on the right shoulder and back of the plaintiff. In the fall of 1949, plaintiff was confined to St. Vincent's Hospital at Billings, Montana, for three or four days with acute laryngitis (Tr. 33, 34, 41). On January 3, 1950, he was confined to the St. Vincent's Hospital with

broncho-pneumonia. He was to be released on January 7, 1950, at which time he developed the symptoms which he contends were caused by the formation of a thrombus in the vena cava, as a result of the injuries sustained on June 2, 1949, some seven months earlier. That the thrombus formed an embolus which passed through the vein against the flow of blood in the vein into the leg at the time he arose from his hospital bed.

The plaintiff's height is six feet one-quarter inch; normal weight is from 175 to 185 pounds.

This medical history indicates that in addition to the normal childhood diseases plaintiff has twice had pneumonia, has had acute nephritis with a continuing history, has twice suffered from acute laryngitis, had an automobile accident in which he sustained the same injuries that occurred on June 2, 1949, and was in an intervening accident in the year 1948 while a passenger on the airlines. These facts would lead to the conclusion that the plaintiff has had more than a normal amount of sickness and injuries from accident during the course of his lifetime.

The accident which occurred on June 2, 1949, at about 2:00 o'clock P. M. at Pocatello, Idaho, involved the same type of injuries that occurred in the automobile accident in which the plaintiff was involved in 1947, and he received the same treatment after both accidents (Tr. 35, 76, 77).

The important question in the lower Court was: Has the plaintiff sustained the burden of proof in establishing the proximate cause of the condition which began on January 7, 1950, and resulted in permanent disability to some extent?

There was no dispute between the parties as to the law. As cited in plaintiff's brief, §93-301-4 R. C. M., 1947, fixes the degree of proof necessary. It states in part:

> "Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind."

There was expert testimony in this case by Dr. Harry R. Soltero, one of the plaintiff's doctors; Dr. Robert Scott Stokoe, one of plaintiff's doctors; Dr. C. H. Horst, one of plaintiff's doctors; and Dr. Louis Clayton Allard, a doctor for the defendant.

Dr. Harry R. Soltero, who was the doctor first consulted by the plaintiff following the accident on June 2, 1949, and who was also the doctor treating the plaintiff for his injuries sustained in the automobile accident in 1947, gave no testimony with reference to any injuries other than the injuries to the shoulder and back of the plaintiff, and in this he testified that the reasonable value of the services which he rendered in that connection in the summer of 1949 was $12.00 (Tr. 107). This is not controverted. Dr. Soltero testified that he diagnosed the same condition in the 1947 and 1949 accidents (Tr. 96, 97, 98) which was a supra clavicular neuritis on the right side, and he treated the plaintiff for this condition and that he responded normally to the treatment

The second doctor testifying was Dr. Robert Scott Stokoe, who was the physician attending the plaintiff in early January of 1950. Dr. Stokoe testified (Tr. 155) that a thrombus will form in a few days. He went on to

identify the vena cava and aorta, and when asked (Tr. 163, 164):

> "Q. All right, we will ask it that way. What was the source of the embolus, in your opinion?
>
> A. I can't state where the embolus arose; it is impossible to state where it arose by anything short of an autopsy; I couldn't say where it arose. When we do eliminate the heart and we do eliminate the lungs, we can simply give an opinion that it may have arisen from the wall of the aorta as the only other remaining source, providing we also rule out a patent foramen ovale, which we previously discussed, through which an embolus could conceivably get from the venous side of the body to the arterial side. It is extremely doubtful, and it is extremely rare that an embolus gets from the venous side to the arterial side through this opening; so, if we rule out that as well, we know that it had to come from the arterial side, from the lung, the heart, or the aorta as the only remaining sources. To the best of our ability we have ruled out the heart. I still cannot say that this came from the aorta.

from which it seems that it was Dr. Stokoe's conclusion that he did not know where the embolus arose; but it reasonably could have come from the aorta (Tr. 167, 168). Dr. Stokoe testified as follows:

> "A. I can't say where it arose. I can give a possibility with the aorta, or the lining of the aorta, probably, there being, as stated, an increase in pressure as you have asked being present momentarily, it is conceivable that a tear, either minimal or large, could happen in the wall of the aorta. Did it happen? I don't know; it is possible that it did happen.
>
> Q. Is there, to your knowledge, any way, or any method that a physician can definitely state the source of a thrombus or where a thrombus forms inside of a blood vessel?
>
> A. Under the conditions in this specific case, no."

Dr. Stokoe, in effect, testified that he did not know where the embolus arose and that it is impossible in this case to tell where it did arise. He speculated on possibilities.

Even Dr. Horst, after testifying with reference to a case in 1880 in which a runner held his breath as a precedent, testified as follows (Tr. 309, 310, 311):

"Q. Your reason for so testifying and referring to that story is to show it is within the realm of possibility?

A. Yes, sir.

Q. That a thrombus could have developed in Mr. Hennessey's case?

A. That's right.

Q. The purpose is to show us that this could happen, it is within the realm of possibility?

A. Yes.

Q. It isn't a normal thing, it isn't the usual thing?

A. That's right.

Q. Doctor, did you consider in your diagnosis and your analysis of this case the fact that Dr. Soltero treated Mr. Hennessey for a right shoulder condition arising out of the automobile accident?

A. Yes, sir.

Q. He gave him diathermy, I believe, wasn't it; deep therapy is the same thing, isn't it?

A. He treated him with diathermy, and perhaps some deep therapy. He advised him to go to an osteopath, stating that was the reason a medical man couldn't treat it with much satisfaction.

Q. Did he advise him to go to an osteopath after the automobile accident or after the accident down at Pocatello? I don't believe it is necessary to go into your notes.

A. I would say it was after Three Forks. I would rather wait and see.

Q. Your best memory is that it was after Three Forks?

A. Here it is. It was June 2nd, it was after, the next day, it was right after the accident on June 2nd, 1949. 'I went home,' then he said 'The next day then I went home to Billings. My right shoulder was stiff and sore. I consulted Dr. Soltero, M. D. He gave me three diathermy treatments for my shoulder. He told me it was a type of injury that a medical doctor could not do much with and that whenever it bothered me again, to go to a good osteopath and have it rubbed out. After that, I had a nurse rub it out when necessary. I did not need my shoulder in my work, so I just let it go.'

Q. Doctor, did you consider the fact that Dr. Soltero gave Mr. Hennessey diathermy treatments after the automobile accident, that so far as the right shoulder was again concerned, he gave him diathermy treatments again, substantially the same treatment following the accident at Pocatello, Idaho, have you considered that?

A. I didn't know Dr. Soltero gave him treatments after the automobile accident.

Q. He treated him on both occasions and the injury was substantially the same.

A. It wouldn't make any difference to me, and Mr. Hennessey didn't have anything else bothering him. It was just his shoulder. He never knew he had anything wrong with his abdomen. It was only when he got up after he had been in the hospital four days when he was told he had recovered from pneumonia. He got up on his feet and the thing came down in his left groin. He didn't have the slightest idea of that, and it has been brought out time and time again that the man did not know the thrombus was there, and my idea was to find out the reason for the formation of the thrombus and if the thrombus could form within the vena cava.

Q. Doctor, is it within the realm of possibility—I think you said that might take two years or more to develop—is it within the realm of possibility that the thrombus began to develop there at the time from the

rolling over of the automobile and hitting the steering wheel?

A. Well, I didn't think so; I don't think it was injury enough, but it is within the realm of possibility that he could have developed it after that, and it is within the realm of possibility that he didn't have anything wrong with him after that.

Q. As to what happened on January 7th, Doctor, there are many things within the realm of possibility, aren't there?

A. If you go into the realm of possibility, there are, but you see, after the thing develops, you don't have to wander into the realm of possibility because the condition is there. If it was in parts of his heart or kidneys, it would be within the realm of possibility, it would be within the realm of possibility that any kind of condition could have occurred, but it is not within the realm of possibility that there wouldn't be any symptoms of it.

Q. Doctor, it is possible, it is as possible as your theory, I mean, that arising out of the automobile accident there was an internal injury that created a thrombus that finally came loose on January 7th, 1950?

A. Yes, that is within the realm of possibility. The only difference would be the character of the injury. In the case of the fall by the man, that was an entirely different force that struck him than the automobile."

In a reading of Dr. Horst's testimony, which is too lengthy for a complete review here, it leads one to the conclusion that he, as the other doctors also testified, did not know the cause of the condition which arose. He stated that it is within the realm of possibility that the condition could have been caused by the automobile accident in which the plaintiff was involved, which is even more remote in time than the accident here occurring. It

was his opinion that the clot developed in the vena cava rather than in the aorta, as was testified to by Dr. Stokoe and Dr. Allard, and indeed this is necessary to sustain his theory based on the case history cited.

Dr. Allard stated (Tr. 395, 396):

> "Q. And what, in your opinion, Doctor, was the cause of his difficulty?
>
> A. It was my impression that Mr. Hennessey suffered an occlusion—first of all suffered a saddle embolus at the bifurcation of the aorta, and that on this same day, that slipped off the saddle and lodged in the arteries of the left lower extremity, producing an occlusion of the arterial supply there.
>
> Q. Doctor, is there any way that you know that you can determine what the source of the embolus was?
>
> A. In this particular case?
>
> Q. Yes.
>
> A. No, sir, checking over the various possibilities as to sites of origin of this embolus, there is nothing specific to indicate any definite site of origin and nothing to give us a clue or guide to this area.
>
> Q. What, in fact, is an embolus, Doctor?
>
> A. An embolus is a loose—in this particular case, a loose blood clot in a blood vessel. It is a broken off thrombus or a clot that is free.
>
> Q. Yes. Would a thrombus that developed 20 years previously be as well attached for medical purposes to the walls of a blood vessel as would a thrombus five years old or six months old?
>
> A. Yes, sir, I believe that for these various periods of time, six months upward, that the thrombus would have organized, or have changed into scar tissue, and by that time would be an integral part of the blood vessel, rather than an inert clot."

Dr. Allard further testified that two weeks would be the maximum time that would expire before an occlusion

of the vessel occurred (Tr. 396, 397). Dr. Allard further testified that it would be impossible to have a clot that only partially blocked a blood vessel for any period of time (Tr. 407):

> "Q. And it would be impossible, you believe, to have a clot that would only partially block a blood vessel?
> A. Yes, for any period of time."

Dr. Allard further testified (Tr. 410) that it was impossible for him to determine the site of origin of the embolus.

From all of this medical testimony, it is the contention of the defendant, that none of the doctors knew the cause of the thrombus or where it formed or when it formed. Each of them speculated on certain possibilities, two of them believing that the best possibility was a formation of the thrombus in the aorta, which is not compatible with the theory of causation as testified to by Dr. Horst, who believed the best possibility was that it was formed in the vena cava. In the point of time, it appears that there is no agreement among the doctors as to when the thrombus formed. Dr. Allard specified a maximum of two weeks, Dr. Stokoe a matter of days, and Dr. Horst testified that it was possible that it had its origin in the injuries sustained in the automobile accident. Dr. Horst started with the premise that there was an embolus, therefore there was a cause, and then speculated that a possible cause was the falling of the government employee upon the plaintiff.

It is to be observed in connection with Dr. Horst's testimony that while the condition to which he testified occurred January 7, 1950, he did not examine the plaintiff

until January 10, 1953, three years later (Tr. 212). Upon the bases of this fact alone, the trial Court was warranted in rejecting his testimony.

> "While it may be that the science of medicine has reached the point where a doctor can form some opinion as to the condition of a tubercular patient ten years before he sees him, it nevertheless must be true that such opinions can scarcely be weighted in the same balance with that of a doctor who examined and treated him at the time." *Rentfrow* v. *United States,* 10th Cir., 67 F. 2d, 747. See also 32 C. J. S. Evidence Section, 572 (page 419 et seq.), *United States v. Fotopulos,* 180 F. 2d, 631, 639.

CONCLUSION

We submit to the Court that the Findings of the Court were not "clearly erroneous", and in fact the plantiff has failed to prove by prepoderance of the evidence the nature of the physical condition resulting in the condition complained of, in that he failed to establish the site of origin of the thrombus. He likewise failed to prove by preponderance of the evidence that in the point of time the embolus could and did result from a thrombus caused by accident occurring seven months earlier. The plaintiff failed to prove by preponderance of the evidence the causal connection between the condition which existed following January 7, 1950, and the accident which occurred on June 2, 1949, and he certainly failed to prove by preponderance of the evidence that the accident which occurred on June 2, 1949, was the proximate cause of the embolus which occurred on January 7, 1950. From the evidence it is as consistent to believe a causal connection from the in-

juries sustained in the automobile accident as the one complained of.

The judgment should be affirmed.

Respectfully submitted,

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